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No. 431

In the Supreme Court of the United States

OCTOBER TERM, 1947

TIMOTEO MARIANO ANDRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the circuit court of appeals (R. 106–113) is reported at 163 F. 2d 468.

JURISDICTION

The judgment of the circuit court of appeals was entered August 14, 1947 (R. 114), and a petition for rehearing was denied October 8, 1947 (R. 115). The petition for a writ of certiorari was filed November 6, 1947, and was granted December 22, 1947 (R. 117). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the jury were correctly instructed in respect of their right to qualify a verdict of guilty of murder in the first degree by adding the words "without capital punishment."

2. Whether the jury were correctly charged in respect of the requirement that their verdict must be unanimous.

3. Whether the jury were sufficiently instructed that they should not consider the fact that an indictment had been returned as evidence of guilt.

4. Whether the district court had power, under Section 323 of the Criminal Code, as amended, to sentence petitioner to death by hanging.

STATUTES INVOLVED

Section 275 of the Criminal Code (18 U. S. C. 454) provides in pertinent part:

> Every person guilty of murder in the first degree shall suffer death. * * *

Section 323 of the Criminal Code, as amended by the Act of June 19, 1937, c. 367, 50 Stat. 304 (18 U. S. C. 542), provides:

> The manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed. The United States marshal charged with the execution of the

> sentence may use available State or local facilities and the services of an appropriate State or local official or employ some other person for such purpose, and pay the cost thereof in an amount approved by the Attorney-General. If the laws of the State within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof.

Section 330 of the Criminal Code (18 U. S. C. 567) provides:

> In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto "without capital punishment"; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life.

Section 10851 of the Revised Laws of Hawaii (1945) provides in pertinent part:

> The warden of Oahu prison or some one deputed by him shall inflict the punishment of death, by hanging the criminal by the neck until dead * * *.[1]

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[1] The corresponding section (5544) of the 1935 edition of the Revised Laws, which was in effect on March 31, 1944, the date of the imposition of the death sentence involved herein (R. 54–55), was identically worded.

STATEMENT

On December 17, 1943, petitioner was indicted in the District Court of the United States for the Territory of Hawaii, for the first-degree murder, by stabbing, of a woman named Carmen Saguid in Civilian Housing Area No. 3 at Pearl Harbor (R. 2, 5). At petitioner's trial, 22 witnesses testified for the Government and numerous exhibits were received (R. 43–49).[2] No evidence was presented by the defense (R. 49).

In his charge to the jury (R. 6–26), the trial judge gave, among others, the following instruction (R. 24):

> I instruct you that you may return a qualified verdict in this case by adding the words "without capital punishment" to your verdict. This power is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.

This was immediately followed by the following instruction, requested by petitioner (R. 24):

> I instruct you, gentlemen of the jury, that even if you should unanimously agree from the evidence beyond all reasonable doubt that the defendant is guilty as charged, you may qualify your verdict by adding thereto "without capital punish-

[2] The testimony is not contained in the record.

ment" in which case the defendant shall not suffer the death penalty.

In this connection, I further instruct you that you are authorized to add to your verdict the words "without capital punishment," and this you may do no matter what the evidence may be and without regard to the existence of mitigating circumstances.

After the jury had retired to consider their verdict, they returned to the courtroom, and the foreman asked (R. 99):

> The members of the jury would like to know if a verdict of guilty in the first degree was brought in, whether it would be mandatory on the part of the Judge to sentence the man to death, or hanging, or use his own discretion.

The trial judge replied (R. 100):

> * * * The answer to the question is that, in the absence of a qualified verdict, if the verdict is guilty of murder in the first degree, the Court has no discretion, for the statute provides in such event that the person so convicted of such an offense—murder in the first degree—shall suffer the punishment of death. As I told you in your instructions, there is another Federal statute which enables you gentlemen to qualify your verdict and to add, in the event you should find the person guilty of murder in the first degree, to add to that verdict, I repeat, the phrase "without capi-

> tal punishment." In that event the man, of course, under the statute so convicted would not suffer the punishment of death but it would [be] life imprisonment, * * *.

He then reread to the jury the foregoing instructions (R. 100–101).

The jury again retired and later returned an unqualified verdict of guilty of murder in the first degree (R. 51). Petitioner, accordingly, was sentenced to death by hanging (R. 55). On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of conviction was affirmed (R. 114).

Other pertinent instructions involved herein are discussed in the Argument, *infra*.

SUMMARY OF ARGUMENT

I

A. The jury were correctly instructed, in accordance with this Court's decision in *Winston* v. *United States*, 172 U. S. 303, that if they found petitioner guilty of murder in the first degree they had the power to qualify their verdict with the words "without capital punishment," that whether or not they should thus qualify the verdict was a matter lying entirely within their discretion, and that they might add the qualification no matter what the evidence might be and without regard to the existence of mitigating circumstances.

B. The various specific considerations mentioned in the *Winston* opinion as possible legitimate reasons which might induce a jury to qualify a first-degree murder verdict are not required to be specifically called to the jury's attention.

C. The instructions to the effect that the jury should eliminate considerations of sympathy and confine themselves to the evidence and the issues in reaching a verdict had no relation to the question of whether they should qualify a first-degree murder verdict with the words "without capital punishment," but were concerned solely with the question as to what they should and what they should not consider in determining the primary issue of petitioner's guilt or innocence.

II

A. The jury were instructed that if they found petitioner guilty of murder in the first degree they had the power to qualify their verdict with the words "without capital punishment," but that their decision to add the qualification had to be unanimous. We think this instruction was correct because, in our view, Section 330 of the Criminal Code, properly construed, means that before the jury may qualify their verdict they must unanimously agree to do so and that if they are unable to achieve unanimity in respect of adding the qualification, their primary, and unanimous, verdict of first-degree murder stands un-

qualified. This interpretation of the section was adopted by the dissenting judge in *Smith* v. *United States*, 47 F. 2d 518 (C. C. A. 9). The majority view in the *Smith* case, which the court below reaffirmed—that the jury must unanimously agree *not* to add the qualifying words before they may return an unqualified verdict of first-degree murder—seems to us erroneous.

1. The plain words of the applicable federal statutes support our view. The normal penalty for first-degree murder is death, as provided in Section 275 of the Criminal Code. Section 330 qualifies this section by giving the jury the power to qualify a verdict of first-degree murder with the words "without capital punishment." A jury's decision to add the qualification must be unanimous. If they cannot achieve unanimity in this respect their basic verdict of guilty of first-degree murder must stand unqualified. In the hypothetical case—the most extreme that can be imagined—in which eleven jurors wish to qualify and only one juror is opposed, it may not properly be said that the one juror sends the accused to his death. It is the congressional mandate of Section 275 which condemns him to death.

2. The legislative history of Section 330 sheds no affirmative light one way or the other on the precise question in issue. It contains no suggestion, however, that Congress intended a mean-

ing other than that which, in our view, the plain words of Section 330 convey.

3. State decisions construing comparable statutes support our view as to the meaning of Section 330. Moreover, instructions substantially like that given in the instant case in regard to the requirement of unanimity went unchallenged in three District of Columbia first-degree murder cases reviewed by the Court of Appeals and this Court.

B. If the Court should reject our interpretation of Section 330, we think that the instructions below were inadequate and the judgment below should be reversed.

III

The jury were sufficiently cautioned that they should not consider the fact that an indictment had been returned as evidence of guilt. The trial judge's comments which are complained of—to the effect that the return of the indictment meant that the grand jury believed petitioner was probably guilty of the crime charged—were made in the course of an instruction which was plainly designed to protect the cause of petitioner. The point of this instruction was that the grand jury, in indicting petitioner, had heard only the Government's side of the case, and that it was only at the trial that petitioner had the opportunity to pre-

sent his defense. Numerous times thereafter in the course of the charge, moreover, the trial judge repeated and reemphasized to the jury that the fact of the indictment's return must not be considered by them in the slightest degree as evidence of the truth of the charge contained in it, and he fully expounded the principle of the presumption of innocence.

IV

Section 323 of the Criminal Code, as amended in 1937, provides that "The manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed." Prior to the 1937 amendment, the prescribed mode of executing death sentences was by hanging. The sole purpose of the amendment was to make the manner of executing federal death sentences conform to the manner prescribed by law in the jurisdiction in which the federal court imposing the sentence is located. It is manifest that Congress, in using the word "State" in the amending provision, did not intend to exclude Territories from its purview. For if the word "State" is construed as limited to the forty-eight States of the Union, there would be no method prescribed by law for executing death sentences imposed by federal courts sitting in Territories—surely an anomalous

result. Even a penal statute may not be so strictly or technically construed as to defeat a manifest congressional intent. Technically, moreover, the word "State" may include a political community like a Territory.

ARGUMENT

I

THE JURY WERE CORRECTLY INSTRUCTED CONCERNING THEIR DISCRETIONARY POWER TO ADD "WITHOUT CAPITAL PUNISHMENT" TO A VERDICT OF FIRST-DEGREE MURDER

In *Winston* v. *United States*, 172 U. S. 303, the question presented was the proper construction of Section 1 of the Act of January 15, 1897, c. 29, 29 Stat. 487, the predecessor of Section 330 of the Criminal Code (*supra*, p. 3), the wording of which, in pertinent part, is identical with that of the earlier statute. The trial court in the *Winston* case had instructed the jury that they should not qualify a verdict of guilty by the words "without capital punishment" unless, in the judgment of the jury, there existed "palliating circumstances which would seem to justify and require it" (172 U. S., at 306). This Court held that such an instruction was erroneous, saying (172 U. S. at 312–313):

> The right to qualify a verdict of guilty, by adding the words "without capital

> punishment," is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury and of the jury alone.

A. Petitioner contends that the trial judge's instructions concerning the jury's power to qualify their verdict were erroneous because "the *Winston* case invites, if it does not command, trial courts to instruct juries that their discretion in the mat-

ter of qualifying their verdicts is not limited to cases in which there are palliating circumstances" (Pet. 9). It appears quite clear that this contention is not well taken in view of the trial judge's unequivocal instructions that "the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment" (*supra*, p. 4), and that "you are authorized to add to your verdict the words 'without capital punishment,' and this you may do no matter what the evidence may be and without regard to the existence of mitigating circumstances" (*supra*, p. 5).

B. Petitioner further contends that the instructions as to the jury's right to qualify their verdict (*supra*, pp. 4–5) were deficient in that the considerations mentioned in the quoted passage from the *Winston* opinion as possible legitimate reasons which might induce a jury to qualify their verdict ("age, sex, ignorance," etc.) were not called to the attention of the jury (Pet. 9). The contention is clearly without merit. The *Winston* case held that the question of whether a verdict of guilty should be qualified must be left by the trial judge to the absolute and unfettered discretion of the jury. This the trial judge did in the instant case. The opinion in the *Winston* case does not suggest that the various "considerations" mentioned therein must be specifically called to the

jury's attention. It merely refers, by way of example, to some of the considerations which might appeal to a jury as reasons for adding the qualification. There plainly is no intimation in the opinion, as the court below pointed out (R. 108–109), that the trial judge's charge must specifically list such considerations.

C. Petitioner also contends that the trial judge affirmatively invaded the jury's discretion to qualify their verdict for any reason whatsoever that might appeal to them, by instructing them "to eliminate sympathy and to confine [themselves] to the evidence and to the issues" (Pet. 10). In support of this contention he quotes several instructions to the effect that the jury must not permit sympathy, passion, or prejudice to affect their judgment, but must confine themselves to the evidence and the issues (Pet. 2–3). These admonitions, however, were given early in the charge (R. 7–8), when the judge was instructing the jury as to what they should and should not consider in deciding the primary question of the guilt or innocence of petitioner. The matter of the jury's right to qualify a verdict of guilty by adding the words "without capital punishment" was not reached until much later in the instructions (R. 24), and the later instructions were not only devoid of any admonition not to be influenced by sympathy or compassion, but contained the positive instruction that the right to

add the qualifying words might be exercised "no matter what the evidence may be and without regard to the existence of mitigating circumstances" (R. 24). As the circuit court of appeals pointed out, in answering the present contention (R. 109):

> * * * The admonition [not to be influenced by sympathy or compassion] was given in what may be termed the prologue to the instructions. This introductory matter dealt in general terms with the differing functions of the judge, counsel and the jury in the trial of the case. A study of these introductory remarks persuades us that the instruction complained of could hardly have been understood otherwise than as having reference to the duty of the jury in arriving at their decision on the primary question before them, namely, whether the accused was guilty of the crime charged. It was not until much later in the charge that the court commented on the power to qualify the verdict, and its comments on the subject could leave the jury in no doubt that relief from the death penalty was a matter committed without limitation to their discretion.

That the jury was not misled into thinking they must eliminate considerations of sympathy or compassion in determining whether to qualify their verdict is confirmed, moreover, by the incident of the jury's return to the courtroom. After having retired to consider their verdict, the

jury returned to inquire whether, in the event they returned an unqualified verdict of guilty, it would be mandatory on the judge to sentence the accused to death, or whether the judge might use his own discretion. The reply was that, unless the verdict was qualified, the death sentence was mandatory. The judge then read to the jury once more his instructions concerning their power to qualify their verdict, thus, as the court below observed (R. 110), "stressing at a crucial moment the unfettered nature of the right."

II

THE JURY WERE CORRECTLY INSTRUCTED CONCERNING THE REQUIREMENT OF UNANIMITY IN RESPECT OF ADDING OR OMMITTING THE QUALIFYING WORDS "WITHOUT CAPITAL PUNISHMENT"

Petitioner further objects to the trial judge's instruction (R. 25), which he later repeated (R. 101), that, in order for the jury to return a qualified verdict of murder in the first degree their decision to do so must be unanimous. Petitioner contends that the instruction was the equivalent of telling the jury "that if they were unanimous in agreeing that petitioner was guilty of murder in the first degree but could not agree as to the qualification they were nevertheless to return a verdict of murder in the first degree without qualification" (Pet. 10). The circuit court of appeals said in its opinion (R. 110) that this instruction presented "the one difficult problem in

the case." The court reaffirmed its earlier holding by a divided court (*Smith* v. *United States*, 47 F. 2d 518) that the jury's decision not to qualify a first-degree murder verdict by adding "without capital punishment" must be no less unanimous than its decision so to qualify such a verdict. Accordingly, the court observed (R. 112), "It follows that the instruction given here, while correct so far as it went, did not completely expound the applicable law. A full exposition would have included the charge that before the jury may return a verdict of first degree murder without qualification, their decision to do so must in like manner be unanimous."

Nevertheless, the court below concluded that the failure to instruct the jury thus expressly would not justify a reversal. The court observed that "Jurors ordinarily understand, without being told, that they are under no legal compulsion to join in a verdict with which they are in disagreement, either in whole or in part; and unless they are instructed to the contrary, as they were in *Smith* v. *United States*, *supra*, they may be relied upon to adhere to the common understanding of their ancient prerogative" (R. 112). The court further observed that "following immediately upon the giving of the instruction in question was a flat charge that 'the unanimous agreement of the jury is necessary to a verdict,' and that 'while a unanimous verdict is required it must be arrived at by each juror's

voting as he believes the law and the evidence justifies him in voting'" (R. 112–113; see R. 97–98). Accordingly, the court concluded, "Although this admonition was couched in general terms, we are satisfied that it served to dispel any uncertainty that the immediately preceding charge might have engendered" (R. 113).

In the *Smith* case, involving a prosecution for rape, the jury were instructed that if they returned an unqualified verdict of guilty the court would be bound to sentence the accused to death, but that if they qualified their verdict by adding the words "without capital punishment" the court would be bound, by virtue of Section 330 of the Criminal Code (*supra*, p. 3), to sentence him to life imprisonment. One of the jurors then inquired what the result would be if they were unable to agree upon adding the qualification. The trial judge instructed them that if they agreed on a verdict of guilty, but could not agree upon adding the qualification, the verdict would stand as guilty without the qualifying words. The jury returned an unqualified verdict of guilty, and the accused was sentenced to death. On appeal, the judgment was reversed, one judge dissenting, and a new trial ordered, on the ground that the instruction given in response to the juror's question was erroneous. A majority of the court construed Section 330 as meaning that the jury's decision to omit the qualifying words from a verdict of guilty was required to be no less

unanimous than their decision to add the qualification. The court said (47 F. 2d, at 519–520):

> The question now presented for consideration is this: If in the judgment and consciences of, say, eleven jurors, they are of opinion that it would not be just or wise to impose capital punishment in a given case, must they yield their convictions and submit to an unqualified verdict because one recalcitrant juror insists upon the death penalty? This may appear to be an extreme case, but such a contingency is neither impossible nor improbable, if the charge of the court below was correct. We cannot believe that such is the law, or that Congress so intended. Unanimity in a verdict, unless otherwise provided by statute, is one of the incidents and essentials of a jury trial. In a criminal case, this unanimity extends to the question of guilt or innocence, to the degree of the crime, where the offense is divided into different degrees, and to the kind or character of punishment, where that question is left to the determination of the jury. The discretion of the jury is unlimited and unrestricted, and if, in the opinion of one or more of the jurors, it would not be just or wise to impose capital punishment, he, or they, are under no legal obligation to join in a verdict without qualification so long as that opinion remains; and an instruction from the court that such is their duty is erroneous, and, of course, prejudicial.

The dissenting judge was of the view that the trial judge had correctly construed Section 330 in his instruction. He said (47 F. 2d, at 521–522):

> The punishment of death for rape was imposed by early legislation of the federal government. Act of March 3, 1825, c. 65, § 4, 4 Stat. 115. In 1897 Congress enacted a law to do away with capital punishment in many cases and to authorize the jury to avoid the infliction of capital punishment, in the event that it so desired. 29 Stat. 487. * * *
>
> It will be observed that by the terms of this statute of 1897 the punishment is not fixed by the jury, but is fixed by the law; at death, with power on the part of the jury to ameliorate that punishment, if it should so recommend. In view of the fact that the function of the jury is to determine the facts, and in a criminal case to determine whether or not the evidence is sufficient, under the law, to establish the guilt of the defendant, it must be clear that the right accorded to the jury by the statute of 1897 in a case of this sort was the right or power to restrict the punishment to life imprisonment, thus giving to its recommendation for mercy the force of a legislative enactment in the particular case pending before the jury. In order to do this, it is clear, it must act in the only way in which a jury can act under our system, that is, as a

unit, and it can only act as a unit when the twelve members agree. * * *

I think that the trial court correctly construed the statute here in question. It might have been more in accordance with mercy and with the ordinary rules concerning the duties of jurors, such as the rule giving to a defendant the benefit of any reasonable doubt that might arise in the mind of any one juror, to have provided the punishment should be life imprisonment, unless the jury should fix the punishment at death. This would require a unanimous verdict in favor of the death penalty, in order to inflict that penalty. But the legislation is evidently framed with the idea that the punishment for rape shall be death as theretofore provided by Congress, unless all the jury shall agree upon the lesser punishment.

The court below adhered to the construction adopted by the majority opinion in the *Smith* case, saying (R. 111–112):

> While it was suggested, on oral argument, that the opinion of the dissenting judge in the Smith case presents the better view, we see no reason to depart from the majority holding. The stand taken is not only the humane construction of the statute; it appeals to us as an interpretation more in harmony with the traditional spirit of the jury system, and with the legislative purpose as well.

A. The Government is of the view, for the reasons which follow, that the dissenting judge's construction in the *Smith* case is the correct one, and that, if this construction be accepted, the instructions of the trial judge in the present case respecting the requirement of unanimity were clearly proper.

1. *The words of the applicable statutes.*—Congress, in clear and unmistakable language, has established death as the mandatory penalty for first-degree murder and for rape committed in any of the places specified in Section 272 of the Criminal Code (18 U. S. C. 451). Thus, Section 275 of the Criminal Code (18 U. S. C. 454; *supra*, p. 2) provides that "Every person guilty of murder in the first degree [3] shall suffer death. * * *." Similarly Section 278 of the Criminal Code (18 U. S. C. 457) provides that "Whoever shall commit the crime of rape shall suffer death." However, in another section of the Criminal Code (Section 330, 18 U. S. C. 567; supra, p. 3) we find the following language, qualifying the penalty provisions for first-degree murder and rape:

> In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto "without capital punishment"; and whenever the jury shall return a verdict qualified as aforesaid, the

[3] Murder in the first degree is defined in Section 273 of the Criminal Code (18 U. S. C. 452).

person convicted shall be sentenced to imprisonment for life.

Thus, a jury which has found an accused guilty of murder in the first degree or rape is given by Congress the power to qualify their verdict by adding thereto "without capital punishment," in which event, and in which event only, the normal and mandatory penalty of death, as decreed by Congress, is eliminated, and a different mandatory punishment—life imprisonment—is provided.

The question immediately arises as to how many of the jurors are required to concur in a decision to add the permissible qualification in order to give it the effect sanctioned by Congress. Does the wish of a single juror to add the qualification suffice? Does qualification require the concurrence of merely a majority? Will the concurrence of eleven of the jurors suffice to effect the qualification? Or must the decision to qualify be unanimous in order that the congressional mandate of death as the penalty shall be reduced, equally by congressional mandate, to life imprisonment? It is submitted that there can be but one answer to these questions, and that is that all twelve jurors, having unanimously found the accused guilty of first-degree murder or rape, must decide with like unanimity to add the qualifying words before they can be inserted in the verdict. Congress has said that "the jury" may

qualify their verdict. "The jury" can mean only "the jury acting unanimously," in the same manner that juries must always act in the absence of special legislation providing otherwise.

But if this proposition be accepted, its corollary cannot logically be denied—that where all twelve jurors agree upon a verdict of first-degree murder or rape but cannot agree unanimously to add the qualification, the verdict stands as found, without the qualification. The argument expressed in the majority opinion in the *Smith* case—that if this be true a single "recalcitrant" juror has the power to send an accused to his death despite the view of his eleven fellows that it would not be wise or just to impose capital punishment—cannot withstand logical analysis. For, in such a hypothetical case—admittedly the most extreme that can be imagined—it is not correct to say that the one "recalcitrant" juror sends the accused to his death. It is the congressional mandate expressed in Section 275 (first-degree murder) or Section 278 (rape) of the Criminal

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[4] Florida provides that a majority of the jury may recommend an accused found guilty of a capital offense to the mercy of the court, in which event the penalty of life imprisonment is mandatory. Fla. Stats. (1941), § 919.23. In view of the clear terms of this statute, the fact that one (*Henry* v. *State*, 39 Fla. 233 (1897)) or two (*Southworth* v. *State*, 98 Fla. 1184, 1191–1192 (1929)) of the jurors recommended the accused, whom they unanimously found guilty of first-degree murder, to the mercy of the court was held ineffective to qualify the verdict, and sentences to death were upheld.

Code, as the case may be, which sends the accused to his death. The only causal relationship between the hypothetical "recalcitrant" juror's refusal to concur with his fellows in adding "without capital punishment" to the verdict, and the accused's being sent to his death, is purely negative in character. By his refusal to concur in the qualification, he prevents the qualification from being made. And without the qualification death is mandatory under the law. If such a result seems harsh, the harshness inheres in the statutory system under which death is the mandatory punishment for first-degree murder and for rape *unless* the jury agree to reduce it to life imprisonment by adding the designated qualification. As the dissenting judge observed in the *Smith* case, *supra*, p. 2, "It might have been more in accordance with mercy * * * to have provided the punishment should be life imprisonment, unless the jury should fix the punishment at death. This would require a unanimous verdict in favor of the death penalty, in order to inflict that penalty." But since Congress has not in fact done so, it would be judicial legislation of an invidious sort to interpret the legislation as though it had.[5]

[5] It is necessary sharply to differentiate the federal system of providing punishment for first-degree murder—making death mandatory unless the jury specify "without capital punishment"—from the system adopted in certain states, notably California, where the law fixes the punishment at death or life imprisonment as the jury, in their discretion, shall determine. See Cal. Penal Code (1941), § 190: "Every

If our reasoning is sound, it follows that it would have been proper for the trial judge specifically to have instructed the jury—as the trial judge in the *Smith* case did in fact—that if they agreed upon a verdict of guilty of first-degree murder, but could not agree upon adding the qualifying words, their verdict should stand as guilty without the qualifying words. The judge, however, did not thus explicitly instruct them. He instructed them that a unanimous decision to qualify was required to add the qualification, and it was only by inference that they might conclude from that instruction that inability to achieve unanimity in respect of adding the qualification would result in their primary verdict's standing unqualified. By virtue of this lack of specificity it seems altogether possible (the court below thought there could be no doubt of it) that the jury may have believed that they could not return an unqualified verdict unless all agreed affirmatively to omit the qualification. We think,

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person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same; * * *." If the federal system were like that of California, it would be undeniable, in our opinion (although the California cases are in some confusion on the matter, see *infra*, pp. 36–37), that it would be incumbent on the jury not only to agree unanimously in a verdict but also, if the verdict was guilty, to agree unanimously on one or the other of the two possible penalties (the alternative being a hung jury), and that a verdict of guilty which did not fix the penalty would, because incomplete, be unable to support a judgment.

however, that it is more likely that if one or more of the jurors were unalterably opposed to infliction of the death penalty he or they would have refused assent to the return of a first-degree murder verdict unless the other jurors agreed to add the qualification. Consequently it is probable that all the jurors actually did agree to omit the qualification. We make these observations solely for the purpose of indicating our belief that, if our interpretation of Section 330 of the Criminal Code is correct, the trial judge's instructions by virtue of the very lack of specificity we have referred to, were more favorable to petitioner than he was entitled to under the law.

2. *The legislative history of Section 330.*—The legislative history of Section 330 of the Criminal Code sheds no affirmative light one way or the other on the precise question now under discussion. From a negative aspect, however, it is significant in that it contains no suggestion that Congress did not in fact intend what, under our view, the plain words of Section 330, read in conjunction with Sections 275 and 278, mean, namely, that unless the jury unanimously agree to qualify their verdict of first-degree murder or rape with the words "without capital punishment," the primary verdict of guilt stands unqualified, with death the mandatory penalty. Following is a brief review of the history of this section:

Section 330 of the Criminal Code derives from

Section 1 of the Act of January 15, 1897, c. 29, 29 Stat. 487, entitled "An Act to reduce the cases in which the penalty of death may be inflicted." This section provided "That in all cases where the accused is found guilty of the crime of murder or of rape [under R. S., §§ 5339 and 5345, whereby murder and rape, respectively, committed in specified places, were declared punishable by mandatory death], the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." Other sections of the 1897 Act abolished the death penalty entirely except for the crimes of murder, rape, treason, and the capital offenses specified in the Articles of War and the Articles for the Government of the Navy. At the time of the passage of this Act there were no degrees of murder under federal law, which merely made "murder," committed in specified places subject to the jurisdiction of the United States, punishable by death.

H. Rep. 108, 54th Cong., 1st sess., accompanying H. R. 878, which later became the Act of 1897, contains the following letter from the then United States Attorney for the Eastern District of Texas, which strongly recommended enactment of the proposed legislation for the reasons indicated in it:

PARIS, TEX., *December 23, 1895.*

SIR: While in Washington in July last I requested the Attorney-General to have introduced and passed by this Congress a bill amending the law as to murder. He inclosed me a copy of bill introduced by you designed for this purpose, which permits the jury to return a qualified verdict finding the party guilty of murder, but "without capital punishment." This bill, in my judgment, covers the question very fully, and I trust very earnestly you will have it passed as soon as possible. I have on the docket of this court for trial at the next term, commencing in April, 73 murder cases, where parties are either in jail or under bond. In many of these cases the facts will not permit the court to submit the question of manslaughter to the jury, and the only question to be determined will be that of murder, which is now punishable only by death, and the severity of the penalty in many cases, where the parties are undoubtedly guilty and should be punished, prevents the juries from either reaching a verdict or leads them to acquit the defendant.

I hope you will succeed in passing the bill at the present term, as it is very necessary to the administration of justice in this court. If you think it will be of any assistance to you, it will afford me great pleasure to write the Texas delegation in

Congress and urge them to lend you their help.

I have the honor to be, very respectfully,

S. TALIAFERRO,
United States Attorney.

Hon. N. M. CURTIS,
House of Representatives,
Washington, D. C.

The report also reprinted and adopted a report of the House Judiciary Committee of the previous Congress, which accompanied a proposed bill seeking to accomplish substantially the same results as the bill which became the Act of 1897 sought to accomplish. The adopted report (H. Rep. 545, 53d Cong., 2d sess., accompanying H. R. 5836) reads in pertinent part as follows:

> The offenses to which the death penalty was affixed during colonial times were adopted from the English code and reenacted in the Federal statutes after the adoption of the Constitution. Few changes have been made during the last century. At this time there are sixty offenses for which Federal laws prescribe the death penalty, positively or conditionally, as a military or naval court-martial may, in its discretion, direct. There have been no executions for many of these offenses for a long term of years. Their existence in the statutes gives a sanguinary character to our laws inconsistent with the spirit of the people and of the age.
>
> While the crimes of murder in the first

degree and rape are, under this bill, punishable with death, provision is made that life imprisonment may be substituted for the penalty of death, in trials in the civil courts, whenever the jury shall qualify their verdict by adding thereto "without capital punishment;" and in trials in military courts for the crimes of desertion in time of war, and aggravated mutiny, imprisonment for life may be substituted for the penalty of death, whenever the court may, in its discretion, so direct.

These modifications are in harmony with the practice of many States and a growing public sentiment.

Your committee recognize the strength of the arguments presented by the advocates of the abolition of the death penalty, supported as they are by statistics and the satisfactory experience of States and countries in which partial or total abolition has been tried; and several members of your committee are fully prepared to recommend the total abolition of the punishment of death. But others believe this penalty to be a great deterrent, and that the people are not, at this time, ready for total abolition; therefore your committee unanimously recommend that for the crimes specified in this bill the punishment of death be retained, with the limitations provided herein, and that for all other crimes for which this penalty is prescribed under existing laws this punishment be totally abolished.

It is evident from these reports that there were two principal motivations for the enactment of the Act of 1897: (1) a desire radically to reduce the number of federal crimes punishable by death, in keeping with the spirit of the times, while still retaining the death penalty for the most revolting crimes, and (2) a desire to reduce the number of hung juries and acquittals in the trials of persons clearly guilty of murder by eliminating mandatory death as the penalty for that crime (this penalty having been found from experience to be a powerful obstacle to convictions because of juries reluctance to see the death penalty automatically inflicted on a finding of guilt) and giving to juries the power to decide that death should not be inflicted, by qualifying their verdicts with words "without capital punishment." These motivations are also reflected in the floor debates on the proposed legislation. See 28 Cong. Rec. 2649–2650, 3098–3111. But neither in the reports nor in the debates is there any suggestion that the jury, in qualifying a verdict, might act otherwise than unanimously, or that they were required unanimously to vote *against* qualifying in order to return an unqualified verdict.

When murder was divided into degrees by the Criminal Code in 1909 (Section 273, 35 Stat. 1143; 18 U. S. C. 452)—first-degree murder being made punishable by death and second-degree murder by imprisonment for from ten years to life (Section

275, 35 Stat. 1143; 18 U. S. C. 454)—the power of the jury to qualify a verdict of first-degree murder (as well as rape) was retained (Section 330, 35 Stat. 1152; 18 U. S. C. 567).[6]

3. *State decisions construing comparable statutes.*—In *Green* v. *State*, 55 Miss. 454 (1877), one of the questions presented was the proper construction of the following Mississippi statute (Act of March 4, 1875, c. 58, § 2, Miss. Laws (1875), p. 79):

> In all cases where any person, or persons, upon conviction of crime, shall, or

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[6] The only possible indication of a congressional intent contrary to the construction we contend for, that occurs to us, is Congress' failure to amend the language of Section 330 to repudiate the interpretation placed upon it by the majority opinion in the *Smith* case in 1931. However, this negative argument has little weight, we think, in view of the clear terms of the section itself.

In the proposed revision and codification of Title 18 of the United States Code (H. R. 3190, 80th Cong., 1st sess.), which has passed the House (93 Cong. Rec. 5048–5049), the provisions of existing law providing for death as the penalty for first-degree murder (18 U. S. C. 454; Criminal Code, § 275), but conferring on the jury the power to qualify their verdict (18 U. S. C. 567; Criminal Code, § 330) are consolidated in a single section (§ 1111 (b)) which reads in pertinent part as follows: "* * * Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life: * * *." The reviser's notes on this section (see H. Rep. 304, 80th Cong., 1st sess., p. A90, accompanying H. R. 3190) merely refer to the proposed consolidation without more. Thus there is clearly no intent in the proposed revision to change the substance of the existing provisions.

> may be punished with death, the jury may, in their discretion, in their verdict, declare that the penalty, or punishment, shall be imprisonment in the Penitentiary for life; but if the jury shall omit to so declare the penalty in their verdict, then the Court shall pronounce the death penalty.

The trial court had instructed the jury in a murder prosecution as follows (55 Miss., at 455):

> If the jury, from the evidence, should find the defendant guilty, and such should be their verdict, then they may, if they think proper, adjudge the penalty to be imprisonment for life in the penitentiary. But if they, while concurring in and agreeing to a verdict of guilty, cannot agree as to adjudging the penalty to be imprisonment for life, then they should return a general verdict of guilty as charged in the indictment.

The jury returned a general verdict of guilty, and the accused was sentenced to death. The Supreme Court of Mississippi, while it reversed the conviction on other grounds, approved the above-quoted instruction in the following language (55 Miss., at 457):

> * * * The act of 1875 (Acts 1875, p. 79) made no change in the law of homicide except to authorize the jury, in their verdict, to declare that the penalty for murder should be imprisonment in the penitentiary for life. * * * One guilty of murder is to be punished with death by

> hanging, unless the jury, in their verdict, shall declare the different punishment mentioned in the act cited. If the jury should agree in the verdict of guilty of murder, but not agree as to declaring the penalty of imprisonment in the penitentiary for life, the verdict of guilty should be rendered, and the penalty fixed by law for murder should follow, because of such guilt and the inability of the jury to agree on a different punishment. The failure of the jury to agree on affixing the punishment should not prevent the rendition of a verdict of guilty concurred in by all.

Five years later, in *Fleming* v. *State*, 60 Miss. 434, 441–442 (1882), in which an instruction substantially like that given in the *Green* case was given (60 Miss., at 437), the court announced its adherence to its *Green* decision. Mississippi's interpretation of a statute substantially like the federal statute is thus seen to be squarely opposed to that of the *Smith* case.[7]

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[7] See also *Harris* v. *State*, 10 So. 478 (Miss., 1891), where the jury in a murder case were instructed that a simple verdict of "guilty as charged in the indictment" would make the death penalty mandatory, and they returned such a verdict, one juror, however, writing after his signature on the verdict the words "opposed to capital punishment." Held, that the verdict supported the death sentence. And in *West* v. *State*, 80 Miss. 710, 714 (1902), the Mississippi Supreme Court dismissed as "frivolous" a contention that an instruction like that given in the *Green* and *Fleming* cases, *supra*, was erroneous.

It should be noted that Mississippi has since amended her law by providing that "In any case in which the penalty pre-

In California, § 190 of the Penal Code (1941) provides in pertinent part:

> Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same * * *.

As we have stated above (note 5, *supra*, p. 25), it is our view that under a statute like California's the jury are required not only to agree unanimously on a verdict but also, if the verdict should be guilty, to agree unanimously on one or the other of the two possible penalties (the alternative being a hung jury), and that a verdict of guilty which does not fix the penalty is incomplete and inadequate to support a judgment. The California decisions are in some confusion, however, in construing this statute.

In *People* v. *Welch*, 49 Cal. 174 (1874), the statute was construed as vesting in the jury discretion to reduce the punishment from death (the normal penalty) to life imprisonment—as though it read, in other words, "* * * shall suffer

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scribed by law upon the conviction of the accused is death, * * * the jury finding a verdict of guilty may fix the punishment at imprisonment for the natural life of the party; * * * but if the jury shall not thus prescribe the punishment, the court shall sentence the party found guilty to suffer death, *unless the jury by its verdict certify that it was unable to agree upon the punishment, in which case the court shall sentence the accused to imprisonment in the penitentiary for life.* * * *" (Italics added.) (Miss. Code (1906), § 1512; Miss. Code (1942), § 2536.)

death, or (in the discretion of the jury) imprisonment in the State prison for life" (49 Cal., at 179–180). Consequently the imposition of the death sentence following the rendition of a simple verdict of guilty as charged, fixing no punishment, was upheld in this case.

In *People* v. *French*, 7 Poc. 822 (Cal. 1885) (see also the same case, evidently on rehearing, 69 Cal. 169 (1886)), a death sentence was upheld notwithstanding the fact that one juror had reported to the court his unwillingness "to sentence the defendant to death" (69 Cal., at 177). The court said (69 Cal., at 180): "* * * a person convicted of murder in the first degree shall not escape punishment because the jury that convicted him by a valid verdict may have disagreed upon the question of punishment, or, which is equivalent to the same thing, returned a verdict which was silent as to the penalty." In *People* v. *Hall*, 199 Cal. 451 (1926), however, a verdict that "We, the jury * * * find the defendant * * * guilty of the crime of murder as charged in the indictment, of the first degree. But cannot come to an unanimous agreement as to degree of punishment" was held not to warrant the death penalty.

The Supreme Court of Nevada, which has exactly the same type of statute as California (Nev. Comp. Laws (1929), § 10068), holds that where the jury cannot agree concerning the fixing of the penalty for first-degree murder, death is

mandatory under the statute. In *State* v. *Skaug*, 161 P. 2d 708, 712–713 (Nev., 1945), the following instruction was held to be correct:

> If the jury finds the defendant guilty of murder in the first degree, then the jury is privileged to fix the punishment at death or confinement in the State Prison for life. If, however, after so finding the degree of the offense, the jury does not agree as to the fixing of the punishment and does not fix the punishment, it will follow as a matter of law that the Court will have to pass sentence inflicting the death penalty.

This decision was reaffirmed in the subsequent case of *Ex parte Skaug*, 164 P. 2d 743 (Nev., 1945), certiorari denied, 328 U. S. 841, which was on Skaug's petition for a writ of habeas corpus for release from his death sentence. It appears from this opinion that the jury had orally anannounced their inability "to agree upon a recommendation" (164 P. 2d., at 748). The Nevada Supreme Court expressed its adherence to its earlier decision in these words (*ibid.*):

> In cases where the jury is unable to agree upon a penalty, or fails to say anything as to punishment, in their verdict, the court, under the uniform interpretation of our statute since the same was adopted, is required, as a matter of law, to impose the death penalty.[8]

[8] See also *In re Russell*, 222 Pac. 569 (Nev., 1924), and *Kramer* v. *State*, 60 Nev. 262, 272–276 (1940).

We question the correctness of the Nevada decisions for the reason that the statute requires the jury to fix the penalty as well as to determine guilt. Under such a statute unanimity in fixing the penalty seems to us to be just as necessary as unanimity in finding guilt. If, however, the Nevada statute were phrased in the manner of the applicable federal statutes, we think her decisions would be correct for the reasons previously given in this brief.

In *Strather* v. *United States*, 13 App. D. C. 132, 142, *Smith* v. *United States*, 13 App. D. C. 155, and *Winston* v. *United States*, 13 App. D. C. 157, 159, all of which were reversed by this Court on other grounds (*Winston* v. *United States*, 172 U. S. 303; see pp. 11–12, *supra*), the juries had been instructed, as in the instant case, that a unanimous decision was required to add "without capital punishment" to their verdicts, and were not instructed that a unanimous decision was required to omit the qualifying words.[9] Thus, in the *Strather* case, the jury were told that "* * * unless you unanimously agree that the verdict should be qualified as the statute provides that you may qualify it, there can be no qualification. It must be the unanimous conclusion of the jury" (13 App. D. C., at 142). Similarly, in the *Winston* case, "That qualification can not be

[9] The instructions to this effect also appear in the "Statement of the Case" preceding this Court's opinion in the *Winston* case. See 172 U. S., at 306, 308, 309.

added unless it be the unanimous conclusion of the twelve men constituting the jury" (13 App. D. C., at 159). It is interesting, and perhaps not entirely without significance, to note that no question appears to have been raised concerning the propriety of these instructions, either in the opinions of the Court of Appeals, in the petitions for certiorari or the briefs on the writs (Nos. 431–433, Oct. Term, 1898), or in this Court's opinion.[10] While we recognize that these cases are not authority on the question at issue, the point seemingly not having been raised, the instructions actually given in the three cases concerning the requirement of unanimity are concrete illustrations of what evidently was the customary instruction in this respect in the District of Columbia during the years when the jury's power to qualify first-degree murder verdicts existed in the District.[11]

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[10] In the Government's brief, however, at p. 16, it was stated: "A further objection is made to the charge of the court in the Winston case, that the court should not have informed the jury that the addition of the words 'without capital punishment' must be by the unanimous consent of the jury; but in so doing the court only informed the jury what the law is—that is, in a criminal case the verdict of the jury must be unanimous."

[11] Prior to the adoption of the District of Columbia Code, the Act of January 15, 1897 (the predecessor of Section 330 of the Criminal Code) applied in the District. *Strather* v. *United States*, 13 App. D. C. 132, 145–146, reversed on other grounds, 172 U. S. 303. But since adoption of the D. C. Code the Act ceased to be applicable in the District. *Johnson* v. *United States*, 225 U. S. 405, 411–419. In the District

B. If the Court should conclude, contrary to the argument made above, that Section 330 of the Criminal Code, properly construed, requires not only that a jury's decision to qualify their verdict of first-degree murder (or rape) by adding the words "without capital punishment" must be unanimous but also that their decision *not* to qualify their verdict, and thereby in effect to sentence the accused to death, must equally be unanimous, we would feel constrained to differ with the conclusion of the court below that the instructions were adequate. For we feel that there was a reasonable possibility that the jury might have been led to understand from the instructions that, having unanimously agreed on the accused's guilt of first-degree murder, inability to reach unanimity in respect of the qualification required them to return their primary verdict, unqualified.

It is true, as the court below pointed out (R. 112), that "Jurors ordinarily understand, without being told, that they are under no legal compulsion to join in a verdict with which they are in disagreement, either in whole or in part; and unless they are instructed to the contrary, * * * they may be relied upon to adhere to the common understanding of their ancient prerogative." But in a case of this type this common understanding,

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of Columbia, death is the mandatory penalty for first-degree murder, the jury having no power to provide otherwise. D. C. Code (1940), § 22-2404.

it seems to us, lacks the assuring quality it would have in the ordinary case. For here the verdict, "guilty of murder in the first degree," has two aspects: From one point of view, it is a simple finding of guilt of the crime indicated. From another point of view, however—and it is this aspect which causes the difficulty—it is in effect a sentence to death. The latter aspect derives, not from the words of the verdict, but from something negative—the absence of the qualifying words. It seems altogether possible that a jury might conceive the normal requirement of unanimity to have been fulfilled where they are unanimous on the finding of guilt, notwithstanding lack of unanimity in respect of the verdict's negative aspect as a sentence to death, particularly in view of the express instructions that a decision to qualify had to be unanimous and the absence of an express instruction that a decision not to qualify had to be unanimous.

The circuit court of appeals did not, however, rest its conclusion solely on the common understanding of jurors in respect of the requirement of unanimity, but pointed out that, immediately following the giving of the (original) instruction that unanimity was required to qualify a verdict of first-degree murder, the "flat charge" was given that "the unanimous agreement of the jury is necessary to a verdict" and that "while a unanimous verdict is required it must be arrived

at by each juror's voting as he believes the law and the evidence justifies him in voting'" (R. 112–113). The court felt that "Although this admonition was couched in general terms, * * * it served to dispel any uncertainty that the immediately preceding charge might have engendered" (R. 113). It is evident, however, from a reading as a whole of the immediately succeeding instruction to which the court below referred ("Defendant's Instruction No. 14," R. 97–98), that the trial judge was there referring generally to the necessity of unanimity in arriving at a primary verdict of either guilty of murder (including the degree) or of not guilty. He had clearly left the subject of adding the qualification to a verdict of first-degree murder. Consequently, it would seem doubtful that the jury would infer from the general instructions on unanimity that these instructions also applied to the specific question of qualification.

It seems to us that where a jury is told, as they were here, (1) that they must be unanimous in reaching a "verdict" and (2) that if their verdict is first-degree murder and they desire to qualify it, they must be unanimous in so doing, then, if they all agree that the accused is guilty of first-degree murder and cannot all agree to qualify it, there is a real possibility that they might feel bound to return their primary verdict, unqualified. In fact, as we have argued, that is what

Congress intended juries should do under such circumstances. A juror of an analytical turn of mind, therefore, if he was sufficiently conscientious as to conceive it to be his duty to follow the judge's instructions as he understood them even if it meant yielding to his fellow jurors, against his more sensitive sentiments, in the matter of sending the accused to his death, might believe it his duty, where all twelve jurors were in agreement as to the accused's guilt of first-degree murder and all but he favored infliction of the death penalty, to concur in the return of an unqualified verdict. His theory would be that, the jurors having been unable to reach accord on the matter of adding the qualification, their primary, and unanimous, verdict must stand. Because of the reality of this possibility, we think that the doubt as to the unanimity with which the jurors favored the death penalty should be resolved in favor of petitioner, and for that reason, if this Court should uphold the construction of Section 330 of the Criminal Code adopted by the majority opinion in the *Smith* case, 47 F. 2d 518, and reaffirmed by the court below, we suggest that the judgment be reversed.

III

THE JURY WERE SUFFICIENTLY INSTRUCTED THAT THEY SHOULD NOT CONSIDER THE FACT THAT AN INDICTMENT HAD BEEN RETURNED AS EVIDENCE OF GUILT

Petitioner further contends that his trial was unfair because the jury were told that "the indict-

ment against him reflected a finding by the grand jury that he was probably guilty of the crime of murder in the first degree" (Pet. 11). When the instructions complained of (see Pet. 3) are read in the context in which they were given, however, it plainly appears that no prejudicial inference could have been drawn or intended to be drawn. The challenged instructions occurred in the following passage from the main charge to the jury (R. 9–10):

> To the indictment which the grand jury returned against this defendant, this defendant entered a plea of not guilty. That is to say, he denied the charge stated in the indictment and placed himself upon his Country for the purpose of trial. The burden is upon the Government to show to your satisfaction, gentlemen, that this defendant is guilty beyond every reasonable doubt. This burden does not change at any time during the course of the trial. The defendant is presumed innocent of the charge stated in the indictment until he is proven guilty by the degree of proof to which I have previously referred. The presumption of innocence in favor of the defendant is not a mere formality to be disregarded by the jury at its pleasure. It is a substantive part of our criminal law. The presumption of innocence continues with the defendant throughout the trial until you are convinced by the evidence that he is guilty beyond every reasonable doubt.

> When the indictment was returned by the grand jury against this defendant, the defendant had had no opportunity to present his side of the case. The indictment was found by the grand jury upon evidence presented to it by the Government alone, and created in the minds of the grand jury a belief that it was probable that a crime had been committed and that this defendant probably committed that crime.
>
> Upon the evidence [which] it heard, the grand jury indicted this defendant, thereby indicating that it was probable that a crime had been committed, which should be disposed of in this court where both sides could be heard, and this is the stage which we have now reached.
>
> I advise you, gentlemen, that it is the indictment in this case which frames the issues of the case.

No exception was taken to this instruction.

Numerous times thereafter in the course of the charge, moreover, the trial judge repeated and reemphasized to the jury that the fact of the indictment's return must not be considered by them in the slightest degree as evidence of the truth of the charge contained in it. Thus, he charged them that "the indictment in this case contains merely the formal statement of the charge against the defendant and is not to be taken as any evidence of defendant's guilt" (R. 19); that "The indictment in this case is in no sense evidence or proof that the defendant has committed the

alleged crime. It is merely a formal allegation, required by law, alleging that the crime was committed in the form and manner therein set forth. No juror should suffer himself to be influenced in any degree whatsoever by the fact that this indictment has been returned against the defendant" (R. 19–20); that "The presumption of innocence is not a mere form to be disregarded by you at pleasure, but it is an essential, substantial part of the law of the land, and binding upon you and it is your duty to give the defendant the full benefit of this presumption of innocence and to find him not guilty unless the evidence satisfies you of his [guilt] beyond all reasonable doubt" (R. 20). He further charged that "This [the rule of presumption of innocence] is not a mere technical rule to be lightly considered by you, but is a humane provision of the law to which you must give due regard, and if the evidence leaves a reasonable doubt in your mind as to the [guilt] of the defendant or as to any material allegation of the indictment you are bound by the provisions of law and by your oaths, to find the defendant not guilty" (R. 21); that "in a criminal case, the burden of proof * * * never shifts to the defendant, but remains upon the United States of America throughout the case to prove the guilt of the defendant beyond all reasonable doubt. This burden does not, under any circumstance, shift to the defendant to prove his innocence" (R. 21); and that "it is in nowise incumbent upon the

defendant to explain away the evidence offered by any of the witnesses on behalf of the government, nor to produce * * * any evidence to explain why he has been accused of the crime described in the indictment" (R. 22).

Plainly, therefore, as the court below observed (R. 113), "the court fully developed the proposition that the indictment was not to be taken in any sense as evidence of guilt, but was a mere accusation serving the formal purpose of framing the issues. The instructions on this matter tended, as they were designed to do, to protect the cause of the accused." [12]

IV

THE DISTRICT COURT HAD POWER, UNDER SECTION 323 OF THE CRIMINAL CODE, AS AMENDED, TO SENTENCE PETITIONER TO DEATH BY HANGING

Finally, petitioner contends that the district court had no power to sentence him to be hanged (Pet. 12–13). The district court's sentence directed that petitioner be put to death by hanging, this being the manner of executing death sentences provided by statute in the Territory of Hawaii (*supra*, p. 3). Petitioner's argument is

[12] The cases cited by petitioner (Pet. 11) as supporting an alleged conflict of decisions among circuits merely announce the well-settled rule that it is error to refuse to give a requested charge that the indictment is merely a formal accusation and is not to be considered as evidence of guilt. But since this instruction was given in the instant case, as we have shown, not once but many times, there is obviously no conflict as claimed.

that Section 323 of the Criminal Code, as amended (*supra*, p. 23), provides that "The manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed," but does not expressly provide for the manner of inflicting the death penalty in cases where the sentence is imposed by a federal district court sitting in a Territory. The contention is without merit.

Prior to its amendment in 1937, Section 323 provided that "The manner of inflicting the punishment of death shall be by hanging" (35 Stat. 1151). By the Act of June 19, 1937, c. 367, 50 Stat. 304, the section was amended to read in its present form. The purpose of the amendment is stated in H. Rep. No. 164, 75th Cong., 1st sess., accompanying H. R. 2705, the bill which subsequently became the amending Act of June 19, 1937. It is there pointed out that whereas the method of inflicting death sentences imposed by federal courts had been, since the beginning of the Government, by hanging, many states were then using more humane methods of execution, such as electrocution or gas. It was thought advisable, therefore, to change the federal law so as to make the federal mode of executing death sentences the same as that employed in the state within which the federal sentence was imposed. While neither the committee report nor the bill itself expressly referred to Territories, it is obvious that no intent

to exclude Territories from the operation of the law can be inferred from the mere fact that "States" was the word employed. The manifest intent of Congress was to make the federal manner of inflicting death conform to the manner followed in the jurisdiction in which the federal court was located. Otherwise, it would be necessary to impute to Congress the intent of providing that death should be decreed for persons found unqualifiedly guilty of murder in the first degree in federal courts situated in Territories, without providing any method of executing such death sentences. But it is well settled that not even a penal statute may be so strictly or technically construed as to defeat a manifest congressional intent. Cf. *United States* v. *Gaskin*, 320 U. S. 527, 529–530; *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Giles*, 300 U. S. 41, 48; *Gooch* v. *United States*, 297 U. S. 124, 128; *United States* v. *Corbett*, 215 U. S. 233, 242. Consequently, petitioner's contention is untenable. See *Talbott* v. *Silver Bow County*, 139 U. S. 438, 441–446.[13]

[13] In the *Talbott* case, this Court said (p. 444):

"* * * while the word State is often used in contradistinction to Territory, yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. Such a use of the word State has been recognized in the decisions of this court."

CONCLUSION

Although, for the reasons indicated under point II, B, *supra*, we do not think petitioner's sentence of death can be upheld on the theory adopted by the circuit court of appeals, we nevertheless believe, for the reasons set out under point II, A, *supra*, that the conviction and sentence were proper. The other contentions of petitioner we believe to be unmeritorious. We therefore respectfully submit that the judgment of the circuit court of appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 431.—October Term, 1947.

Timoteo Mariano Andres, Petitioner, v. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 26, 1948.]

Mr. Justice Reed delivered the opinion of the Court.

On December 17, 1943, the petitioner, Timoteo Mariano Andres, was indicted in the United States District Court for the Territory of Hawaii for murder in the first degree. 18 U. S. C. §§ 451, 452. The indictment recited that Andres "on or about the 23rd day of November, 1943, at Civilian Housing Area No. 3, Pearl Harbor, Island of Oahu, said Civilian Housing Area No. 3 being on lands reserved or acquired for the use of the United States of America . . . did . . . kill . . . Carmen Gami Saguid . . . ." Andres was tried before a jury which returned this verdict:

> "We, the Jury, duly empaneled and sworn in the above entitled cause, do hereby find the defendant, Timoteo Mariano Andres, guilty of murder in the first degree."

He was sentenced to death by hanging. He appealed his conviction to the Circuit Court of Appeals for the Ninth Circuit. That court affirmed the judgment of the lower court, unanimously. 163 F. 2d 468. A petition for a writ of certiorari was filed in this Court and that petition was granted. —U. S.—.

Four questions were presented in the petition for certiorari. Three of these we do not consider of sufficient doubt or importance to justify an extended discussion. We shall dispose of them before we reach what is, for us, the decisive issue of this case.

Andres contends that 18 U. S. C. § 567,[1] as interpreted by *Winston* v. *United States*, 172 U. S. 303,[2] requires that the trial court explain to the jury the scope of their discretion in granting mercy to a defendant. In the *Winston* case, the judge had charged the jury that they could not qualify their verdict except ". . . in cases that commend themselves to the good judgment of the jury, cases that have palliating circumstances which would seem to justify and require it." 172 U. S. at 306. This Court held that instruction erroneous. The Court read the statute to place the question whether the accused should or should not be capitally punished entirely within the discretion of the jury; an exercise of that discretion could be based upon any consideration which appealed to the jury.[3] In the case now before us, the trial judge gave the

[1] "In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

[2] In *Winston* v. *United States*, *supra*, the question presented was the proper construction of § 1 of the Act of January 15, 1897. 29 Stat. 487. 18 U. S. C. § 567, in its relevant part, has language identical to that of the earlier statute.

[3] 172 U. S. at 312–13:

"The right to qualify a verdict of guilty, by adding the words 'without capital punishment,' is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought

instructions set forth in the margin.[4] It is clear that he left the question of the punishment to be imposed—death or life imprisonment—to the discretion of the jury. We hold that the trial judge's instructions on this issue satisfied the requirements of the statute.

It is next contended that the trial was unfair because the instructions quoted below[5] indicated to the jury that the indictment against the petitioner reflected a finding by the Grand Jury that he was probably guilty of the

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to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone."

[4] "I instruct you that you may return a qualified verdict in this case by adding the words 'without capital punishment' to your verdict. This power is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.

"I instruct you, gentlemen of the jury that even if you should unanimously agree from the evidence beyond all reasonable doubt that the defendant is guilty as charged, you may qualify your verdict by adding thereto 'without capital punishment' in which case the defendant shall not suffer the death penalty.

"In this connection, I further instruct you that you are authorized to add to your verdict the words 'without capital punishment,' and this you may do no matter what the evidence may be and without regard to the existence of mitigating circumstances."

[5] "To the indictment which the grand jury returned against this defendant, this defendant entered a plea of not guilty. That is to say, he denied the charge stated in the indictment and placed himself upon his Country for the purpose of trial. The burden is upon the Government to show to your satisfaction, gentlemen, that this defendant is guilty beyond every reasonable doubt. This burden does not change at any time during the course of the trial. The defendant is presumed innocent of the charge stated in the indictment until he is proven guilty by the degree of proof to which I have previously referred. The presumption of innocence in favor of the defendant is not a mere formality to be disregarded by the jury at its pleasure. It is a substantive part of our criminal law. The presumption of innocence continues with the defendant throughout

crime of murder in the first degree. Perhaps the italicized language in the charge, read out of context, is misleading and it might have been better to omit it completely. However, when the language complained of is read in context, it seems to us that the petitioner had no real ground for complaint. No material error resulted from the words.

The petitioner also argues that the District Court for the Territory of Hawaii did not have the power to sentence him to death by hanging. 18 U. S. C. § 542 provides: "The manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed . . . . If the laws of the State within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof." The petitioner contends that the phrase "laws of the State" limits the statute to the forty-eight states and, consequently, provides for no method of inflicting the death penalty where that sentence is imposed

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the trial until you are convinced by the evidence that he is guilty beyond every reasonable doubt.

"When the indictment was returned by the grand jury against this defendant, the defendant had had no opportunity to present his side of the case. *The indictment was found by the grand jury upon evidence presented to it by the Government alone, and created in the minds of the grand jury a belief that it was probable that a crime had been committed and that this defendant probably committed that crime.*

"*Upon the evidence [which] it heard, the grand jury indicted this defendant, thereby indicating that it was probable that a crime had been committed, which should be disposed of in this court where both sides could be heard, and this is the stage which we have now reached.*

"I advise you, gentlemen, that it is the indictment in this case which frames the issues of the case."

Petitioner complains of the italicized language.

by a district court sitting in a Territory.[6] We reject that contention as being without merit. In many contexts "state" may mean only the several states of the United States. Here, however, we hold that its meaning includes the Territory of Hawaii.

The last and most difficult issue raised by Andres is the question of the propriety of those instructions by which the trial judge attempted to explain to the jury the requirements of unanimity in their verdict. This issue is a composite of two problems: (1) The proper construction of 18 U. S. C. § 567; and (2) the consideration of whether the instruction given clearly conveyed to the jury the correct statutory meaning.

Section 567 of 18 U. S. C. reads as follows: "In all cases where the accused is found guilty of the crime of murder in the first degree . . . the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." If a qualified verdict is not returned, the death penalty is mandatory.[7] The Government argues that § 567 properly construed requires that the jury first

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[6] Section 542, before its amendment in 1937, read: "The manner of inflicting the punishment of death shall be by hanging." 35 Stat. 1151. The changes in the statute from that language to the present language were prompted by the fact that "Many States . . . use[d] more humane methods of execution, such as electrocution, or gas . . . . [Therefore,] it appear[ed] desirable for the Federal Government likewise to change its law in this respect . . . ." H. Rep. No. 164, 75th Cong., 1st Sess., 1. Since Congress was well aware that federal courts had jurisdiction in territories and possessions, it would be incongruous to hold that they did not use the word "state" to cover such areas. The purpose of this legislation was remedial: the adoption of the local mode of execution. The intent of Congress would be frustrated by construing the statute to create that hiatus for which the petitioner contends.

[7] 18 U. S. C. § 454: "Every person guilty of murder in the first degree shall suffer death . . . ."

unanimously decide the guilt of the accused and, then, with the same unanimity decide whether a qualified verdict shall be returned. As the statute requires the death penalty on a verdict of guilty, the contention is that the jury acts unanimously in finding guilt and the law exacts the penalty. It follows, that if all twelve of the jurors cannot agree to add the words "without capital punishment," the original verdict of guilt stands and the punishment of death must be imposed. The petitioner contends that § 567 must be construed to require unanimity in respect to both guilt and punishment before a verdict can be returned. It follows that one juror can prevent a verdict which requires the death penalty, although there is unanimity in finding the accused guilty of murder in the first degree. The Circuit Court of Appeals held that unanimity of the jury was required both as to guilt and the refusal to qualify the verdict by the words "without capital punishment." It interpreted the instructions, however, as requiring this unanimity.

The First Congress of the United States provided in an Act of April 30, 1790: "That if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death." [8] This was the federal law, in the respects here relevant, until 1897. In that year Congress passed and the President signed the Act of January 15, 1897.[9] That statute provided:

> "That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without

[8] 1 Stat. 113.

[9] 29 Stat. 487.

> capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

It is this language, substantially unchanged, which we must construe in this case.[10]

The reports of the Congressional Committees and the debates on the floor of Congress do not discuss the particular problem with which we are now concerned.[11] There are, however, many expressions which indicate that the general purpose of the statute was to limit the severity of the old law.[12]

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[10] The Act of January 15, 1897, was incorporated into the Criminal Code of 1909 as § 330 with changes that are here unimportant. 35 Stat. 1152. Section 330 of the Criminal Code is now 18 U. S. C. § 567.

[11] Dissatisfaction over the harshness and antiquity of the federal criminal laws led in 1894 to the introduction by N. M. Curtis of New York of a bill to reduce the number of crimes for which the penalty of death could be imposed and to give the jury the right to "qualify their verdict [in death cases] by adding thereto 'without capital punishment.'". See H. Rep. No. 545, 53d Cong., 2d Sess. The bill as introduced divided murder into degrees, §§ 1, 2 of H. R. 5836, 53d Cong., 2d Sess.; it was passed by the House without any substantial changes. 27 Cong. Rec. 823. After severe amendment it was favorably reported to the Senate by the Committee on the Judiciary. See S. Rep. No. 846, 53d Cong., 3d Sess. These amendments, however, did not affect § 5 of the original bill, the section which provided for qualified verdicts; that section was retained and became § 1 of the new bill. *Id.* at p. 3. The committee, however, "thought it inadvisable to make degrees in the crime of murder, or attempt new definitions." *Ibid.* Consequently, it struck out the sections of the original bill which concerned themselves with these matters. The Committee Report stated that "The leading object of this bill is to diminish the infliction of the death penalty by limiting the offenses upon which it is denounced, and by providing in all cases a latitude in the tribunal which shall try them to withhold the extremest punishment when deemed too severe." *Id.* at p. 1. The bill as amended was passed by the Senate and later by the House.

[12] See note 11, *supra*; 28 Cong. Rec. 2649–2650, 3098–3111, 3651.

Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply.[13] In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it. We do not think that the grant of authority to the jury by § 567 to qualify their verdict permits a procedure whereby a unanimous jury must first find guilt and then a unanimous jury alleviate its rigor. Therefore, although the interpretation of § 567 urged by the Government cannot be proven erroneous with certainty, since the statute contains no language specifically requiring unanimity on both guilt and punishment before a verdict can be brought in, we conclude that the construction placed upon the statute by the lower court is correct—that the jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system than that presented by the Government.[14]

The only question remaining for decision is whether the instructions given by the trial judge clearly conveyed to the jury a correct understanding of the statute. There was a general charge that "the unanimous agreement of the jury is necessary to a verdict." Later, and the instructions on the specific issue under consideration can best be understood by the colloquy, the following took place:

> "(At 3:45 o'clock, p. m., the jury returned to the courtroom, and the following occurred:)

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[13] See *American Publishing Co.* v. *Fisher*, 166 U. S. 464.

[14] This conclusion is supported by *Smith* v. *United States*, 47 F. 2d 518, which, with the exception of the present case, appears to be the only federal decision on this question.

"The Court: Note the presence of the jury and the defendant together with his attorney. I am advised by the bailiff that the jury wishes to ask the Court a question. Which gentlemen [sic] is the foreman—you, Mr. Ham? You are Mr. Ham?

"The Foreman: . . . The members of the jury would like to know if a verdict of guilty in the first degree was brought in, whether it would be mandatory on the part of the Judge to sentence the man to death, or hanging, or use his own discretion.

"The Court: Just a minute. I want to be right in my answer. You may sit down. Will the counsel come to the bench, please? (Discussion off the record.)

"The Court: Gentlemen of the Jury, the statute, as I recall, answers that question, but I wanted to look at it once again before I gave you a positive answer. The answer to the question is that, in the absence of a qualified verdict, if the verdict is guilty of murder in the first degree, the Court has no discretion, for the statute provides in such event that the person so convicted of such an offense—murder in the first degree—shall suffer the punishment of death. As I told you in your instructions, there is another Federal statute which enables you gentlemen to qualify your verdict and to add, in the event you should find the person guilty of murder in the first degree, to add to that verdict, I repeat, the phrase 'without capital punishment.' In that event the man, of course, under the statute so convicted would not suffer the punishment of death but it would life imprisonment, as I recall it under the statute.

"Does that answer your question?

"The Foreman: Yes.

"The Court: Don't discuss your problems here, but if it is an answer to your question, you gentlemen

can retire to your jury room if there are no other questions.

"The Foreman: No other.

"The Court: Counsel have asked me to reread the instructions to you on that particular point as an amplification of my answer to your question. Will you bear with me just a moment until I find that instruction? I will reread one or two instructions to you which bear on the question which you have asked:

" 'You may return a qualified verdict in this case by adding the words "without capital punishment" to your verdict. This power is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.'

" 'Even if you should unanimously agree from the evidence beyond all reasonable doubt that the defendant is guilty as charged, you may, as I have said qualify your verdict by adding thereto "without capital punishment," in which case the defendant shall not suffer the death penalty.'

" 'In this connection, I further instruct you that you are authorized to add to your verdict the words "without capital punishment," and this you may do no matter what the evidence may be and without regard to the existence of mitigating circumstances.'

"And, finally, you will recall I said that you are instructed that before you may return a qualified verdict of murder in the first degree without capital punishment, that your decision to do so must, like your regular verdict, be unanimous."

The Government concedes that if the petitioner's interpretation of § 567 is accepted, these instructions were inadequate and we find ourselves in agreement with this

concession. The court below concluded that the instructions were proper and that they did not mislead the jury.[15] It based its conclusion upon two factors (1) the common understanding of jurors that "they are under no legal compulsion to join in a verdict with which they are in disagreement, either in whole or in part . . ."; [16] and (2) the general admonition of the trial judge that "the unanimous agreement of the jury is necessary to a verdict." [17]

It seems to us, however, that where a jury is told first that their verdict must be unanimous, and later, in response to a question directed to the particular problem of qualified verdicts, that if their verdict is first-degree murder and they desire to qualify it, they must be unanimous in so doing; the jury might reasonably conclude that, if they cannot all agree to grant mercy, the verdict of guilt must stand unqualified. That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused. The context of § 567 does not defy accurate and precise expression. For example: An instruction that a juror should not join a verdict of guilty, without qualification, if he is convinced that capital punishment should not be inflicted, would have satisfied the statute and protected the defendant. Or the jury might have been instructed that its conclusion on both guilt and punishment must be unanimous before any verdict could be found.

As we are of the opinion that the instructions given on this issue did not fully protect the petitioner, the judgment of the lower court is reversed and the case is remanded for a new trial.

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[15] *Andres* v. *United States*, 163 F. 2d 468, 471.

[16] *Id.* at p. 471.

[17] *Ibid.*

SUPREME COURT OF THE UNITED STATES

No. 431.—October Term, 1947.

Timoteo Mariano Andres, Petitioner, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 26, 1948.]

Mr. Justice Frankfurter, concurring.

Having had more difficulty than did my brethren in reaching their result, I deem it necessary to state more at length than does the Court's opinion the reasons that outweigh my doubts, which have not been wholly dissipated.

This case affords a striking illustration of the task cast upon courts when legislation is more ambiguous than the limits of reasonable foresight in draftsmanship justify. It also proves that when the legislative will is clouded, what is called judicial construction has an inevitable element of judicial creation. Construction must make a choice between two meanings, equally sustainable as a matter of rational analysis, on considerations not derived from a mere reading of the text.

For the first hundred years of the establishment of this Government one guilty of murder in the first degree, under federal law, was sentenced to death. Since 1897 a jury, after it found an accused "guilty of the crime of murder in the first degree . . . may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." Act of January 15, 1897, 29 Stat. 487, as amended, 35 Stat. 1151, 1152, § 330 Criminal Code, 18 U. S. C. § 567.

The statute reflects the movement, active during the nineteenth century, against the death sentence. The movement was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction. Almost every State passed mitigating legislation.[1] Only five ~~six~~ States met the doubts and disquietudes about capital punishment by its abolition. Most of the other States placed in the jury's hands some power to relieve from a death sentence. But the scope of a jury's power to save one found guilty of murder in the first degree from a death sentence is bound to give rise to a problem of statutory construction when the legislation does not define the power with explicitness.

A legislature which seeks to retain capital punishment as a policy but does not make its imposition after a finding of guilty imperative has these main choices that leave little room for construction:

(1) Legislation may leave with the jury the duty of finding an accused guilty of murder in the first degree but give them the right of remission of the death sentence, provided there is unanimous agreement on such remission. Any juror, of course, has it in his power to deadlock a jury out of sheer wilfulness or unreasonable obstinacy. But under such a statute the duty laid upon his conscience is to find guilt if there is guilt. The jury can save an accused from death only if they can reach a unanimous agreement to relieve from the doom.

(2) The legislature may not require unanimous agreement on remission of the death sentence, but may make such remission effective by a majority vote of the jury, or, as in the case of the Mississippi statute, it may expressly provide that

[1] For references to the State legislation see Appendix, pp. 15–18.

> "Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment . . . in which case the court shall fix the punishment at imprisonment for life." (Miss. Code Ann. § 2217 (1942).)

(3) The legislature may require the jury to specify the punishment in their verdict. Under such legislation it is necessary for the jury's verdict not only to pronounce guilt but also to prescribe the sentence.

(4) The jury may be authorized to qualify the traditional verdict of guilty so as to enable the court to impose a sentence other than death. This may be accomplished by giving such discretionary power to the court *simpliciter*, or upon recommendation of mercy by the jury.

None of these types of legislation would leave any reasonable doubt as to the power and duty of a jury. Unfortunately, the alleviating federal legislation of 1897, to which the Court must now give authoritative meaning, was not cast in any one of the foregoing forms. Congress expressed itself as follows:

> "In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." (29 Stat. 487, as amended, 35 Stat. 1151, 1152, § 330 Criminal Code, 18 U. S. C. § 567.)

The fair spontaneous reading of this provision, in connection with § 275 of the Criminal Code—"Every person guilty of murder in the first degree shall suffer death"

(35 Stat. 1143, 18 U. S. C. § 454)—would be that Congress has continued capital punishment as its policy; that one found guilty of murder in the first degree must suffer death if the jury reaches such a verdict but that "the jury may qualify their verdict by adding thereto 'without capital punishment;' " that, since federal jury action requires unanimity, when unanimity is not attained by the jury in order to "qualify their verdict" by "adding" the phrase of alleviation, the verdict of murder in the first degree already reached must stand. Certainly, if construction called for no more than reading the legislation of Congress as written by Congress, to interpret it as just indicated would not be blindly literal reading of legislation in defiance of the injunction that the letter killeth. On the contrary, it would heed the dominant policy of Congress that "every person guilty of murder in the first degree shall suffer death" unless the jury "qualify their verdict by adding thereto" the terms of remission.

But in a matter of this sort judges do not read what Congress wrote as though it were merely a literary composition. Such legislation is an agency of criminal justice and not a mere document. While the proper construction of the power of qualification entrusted to the jury by the Act of 1897 is before us for the first time upon full consideration, the issue was adjudicated more than seventeen years ago by one of the Circuit Courts of Appeals. It rejected the construction for which the Government now contends. *Smith* v. *United States*, 47 F. 2d 518. While a failure of the Government to seek a review of that decision by this Court has no legal significance, acquiescence by the Government in an important ruling in the administration of the criminal law, particularly one affecting the crime of murder, carries intrinsic importance where the construction in which the Government acquiesced is not one that obviously

is repelled by the policy which presumably Congress commanded.

Moreover, we are dealing with a field much closer to the experience of the State courts, as the guardians of those deep interests of society which are reflected in legislation dealing with the punishment for murder and which are predominantly the concern of the States.[2] If the strongest current of opinion in State courts dealing with legislation substantially as ambiguous as that before us has resolved the ambiguity in the way in which the Circuit Court of Appeals for the Ninth Circuit resolved it in the *Smith* case, the momentum of such a current should properly carry us to the same conclusion. History and experience outweigh claims of virgin analysis of a statute which has such wide scope throughout the country and the incidence of which is far greater in the State courts than in the federal courts. This was the approach of the Court in *Winston* v. *United States*, 172 U. S. 303,

[2] There were only twenty-three convictions of first-degree murder in the federal district courts in continental United States, the territories, and the possessions, exclusive of the District of Columbia, during the six-year period beginning July 1, 1941, and ending June 30, 1947. Eight of the defendants convicted were sentenced to death, and fifteen were given life imprisonment. Of the eight sentenced to death, three were executed (see *Arwood* v. *United States*, 134 F. 2d 1007; *Ruhl* v. *United States*, 148 F. 2d 173; *United States* v. *Austin Nelson*, District Court for the Territory of Alaska, First Division, April 18, 1947 (unreported)); the sentence of one was commuted to life imprisonment (see *Paddy* v. *United States*, 143 F. 2d 847); and the sentences of four (including the petitioner here) have been stayed pending their appeals (see *United States* v. *Sam Richard Shockley* and *United States* v. *Miran Edgar Thompson*, District Court for the Northern District of California, Dec. 21, 1946 (unreported); *United States* v. *Carlos Romero Ochoa*, District Court for the Southern District of California, May 19, 1947 (unreported)).

I am indebted for these statistics to the Administrative Office of the United States Courts.

where we held, after reviewing the State legislation and adjudication, that the statute did not limit the jury's discretion to cases where there were palliating or mitigating circumstances.

And so we turn to State law.

A. In only four States is death the inevitable penalty for murder in the first degree: Connecticut, Massachusetts, North Carolina, and Vermont. Such has been, until the other day, the law of England despite persistent and impressive efforts to modify it. See, *e. g.*, Minutes of Evidence and Report of the Select Committee on Capital Punishment (1930). It is worthy of note that this effort has just prevailed by the passage, on a free vote, of a provision abolishing the death penalty for an experimental period of five years. See 449 H. C. Deb. (Hansard) cls. 981 *et seq.* (April 14, 1948); and statement of the Home Secretary that death sentences will be suspended on the basis of this vote, even before the measure gets on the Statute Books. *Id.*, cls. 1307 *et seq.* (April 16, 1948).

B. In ~~six~~ States the death sentence has been abolished for murder in the first degree: Maine, Michigan, Minnesota, Rhode Island, ~~South Dakota,~~ and Wisconsin.

C. Most of the States—~~38~~ of them—leave scope for withholding the death sentence. The State enactments greatly vary as to the extent of this power of alleviation and in the manner of its exercise, as between court and jury.

~~I. In one State—Indiana—no provision is made for jury recommendation, but the court may fix the punishment for murder in the first degree at death or life imprisonment.~~

H. In three States a jury's recommendation of life imprisonment is not binding on the trial court: Delaware, New Mexico, and Utah.

~~III.~~ In ~~thirteen~~ States the jury's verdict must specify whether the sentence is to be death or life imprisonment:

Arkansas, Colorado, Illinois, Iowa, Kansas, Kentucky, Missouri, North Dakota, Oklahoma, Pennsylvania, Tennessee, Texas, and Virginia.

IV. In eight other States the same result is reached, although the legislation is phrased that one found guilty of murder in the first degree suffers death or life imprisonment "at the discretion of the jury": Alabama, Arizona, California, Georgia, Idaho, Montana, Nebraska, and Nevada.

V. In two States the punishment is life imprisonment unless the jury specifies the death penalty: New Hampshire and Washington.

VI. Nine States have statutes more or less like the federal provision here under consideration: Louisiana, Maryland, New Jersey, New York, Ohio, Oregon, South Carolina, West Virginia, and Wyoming.

VII. Two States frankly recognize that differences of opinion are likely to occur when the jury has power to mitigate the death sentence and provide for life imprisonment even when the jury is not unanimous: Florida and Mississippi.

An examination of State law shows that all but four States have abandoned the death sentence as a necessary consequence of the finding of guilt of murder in the first degree; that most of the States which have retained the death sentence have entrusted the jury with remission of the death sentence, although sentencing is traditionally the court's function, and this is true even in those States where the legislature has not in so many words put this power in the jury's keeping; that even where the jury is not required to designate the punishment but merely has the power of recommending or "adding" to the verdict the lighter punishment, the most thoroughly canvassed judicial consideration of such power has concluded that the death sentence does not, as a matter of jury duty, automatically follow a finding by them of guilt of murder

in the first degree, when the jury cannot unanimously agree that life imprisonment should be imposed.

Of the nine States that have enacted legislation more or less like the federal provision under consideration, the statutes of four—Louisiana, Maryland, West Virginia, and Wyoming—are virtually in the identical form. While the highest courts of these States have not passed upon the precise question before us, they have all construed their respective statutes as giving the jury a free choice as to which of the two alternative punishments are to be imposed, although it can fairly be said that such construction runs counter to the obvious reading that the sentence is death unless all of the jurors are agreed as to adding "without capital punishment."[3] Three of the nine

[3] The Supreme Court of Louisiana noted that "in capital cases, it is entirely left to the jury to determine the extent of the punishment in the event of conviction. The jurors, in such cases, are entirely free to choose between a qualified and an unqualified verdict, because the law gives them the unquestioned discretion to return either one or the other." *State* v. *Henry*, 196 La. 217, 233. The Court of Appeals of Maryland held that "In our opinion, it was the purpose of the act to empower juries to unite in a choice of punishments; that is, a choice between limiting punishment to life imprisonment and leaving the court unrestricted in fixing the punishment; and it was intended that all jurors should exercise a discretion in making that choice." *Price* v. *State*, 159 Md. 491, 494. The Supreme Court of West Virginia has held that under that State's statute the jury fixes the sentence and that, therefore, it was reversible error for the trial court to fail to "instruct the jury that it was its duty to find, in the event of a verdict of guilty of murder in the first degree, whether the accused should be hanged or sentenced to the penitentiary for life." *State* v. *Goins*, 120 W. Va. 605, 609. And the Supreme Court of Wyoming in a case where the defendant had entered a plea of guilty of murder in the first degree, held that "A defendant has the right to have a jury not only to try the issue of guilt or innocence, but also to decide what the punishment shall be. The right to a trial on the issue of guilt or innocence may be waived by a plea of guilty, which leaves only the question of the punishment to be decided by the jury." *State* v. *Best*, 44 Wyo. 383, 389–90; see also *State* v. *Brown*, 60 Wyo. 379, 403 (where an instruction to the

States—Ohio, Oregon, and South Carolina—have statutes providing that the penalty is death unless the jury recommends "mercy" or "life imprisonment" in which case the punishment shall be life imprisonment. These have all been construed as providing for alternative punishment in the discretion of the jury.[4] While a similar New Jersey statute has been given the literal construction here espoused by the Government, the history of that State's legislation only serves to underscore the force of the decisions in the other States.[5] The ninth State, New

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jury that "person who is found guilty of murder in the first degree shall suffer death or be imprisoned in the penitentiary at hard labor for life, in the discretion of the jury trying the case" was upheld).

[4] While the judges of the Supreme Court of Ohio differed in their views as to whether the jury in making the recommendation were restricted to considerations based upon the evidence, they were in agreement that the statute gave the jury full and exclusive discretion as to whether or not to make the recommendation. *Howell* v. *State*, 102 Ohio St. 411. In Oregon and South Carolina it is sufficient to charge the jury that they may bring in either verdict. *State* v. *Hecker*, 109 Ore. 520, 559–60; *State* v. *McLaughlin*, 208 S. C. 462, 468.

[5] Prior to 1916 the death penalty was mandatory in New Jersey. In that year the State legislature amended the law by the enactment of the jury recommendation form of statute. In 1919 the New Jersey Court of Errors and Appeals construed the statute to give the jury absolute discretion to bring in either verdict, and, by a close decision, held that the jury was not confined to the evidence in determining whether or not to make the recommendation. *State* v. *Martin*, 92 N. J. L. 436. That same year the legislature enacted into law the views of the dissenting judges requiring that the jury must make the recommendation "by its verdict, and as a part thereof, upon and after the consideration of all the evidence." N. J. Stat. Ann. § 2:138–4 (1939). In *State* v. *Molnar*, 133 N. J. L. 327, 335, the court construed the amended statute to mean that ". . . the penalty is death, determined not by the jury, but by the statute, and pronounced by the court. It is not correct to say that the jury imposes the sentence of death where it does not choose to make the recommendation for life imprisonment."

York, in 1937, amended its legislation, which had made the death penalty mandatory upon all convictions for first-degree murder, by providing that in felony murder cases the jury "may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life." N. Y. Crim. Code and Pen. Law § 1045–a. In *People* v. *Hicks*, 287 N. Y. 165, the Court of Appeals found the following instruction erroneous:

> "There cannot be any recommendation unless the twelve of you agree. But if you have all agreed that the defendant is guilty, it is nevertheless your duty to report that verdict to the Court. Is that clear? Even though you cannot agree on the recommendation. In other words, you cannot use the recommendation as bait, in determining the guilt or innocence of the defendant. . . . if you are all unanimous that there should be a recommendation, it is your duty to bring in the recommendation; but if you are not unanimous on that proposition it is nevertheless your duty to bring in the verdict of guilty of murder in the first degree, even though you cannot agree on the other. Is that plain?" (287 N. Y. at 167–68.)

The Court of Appeals held that the statute expressly empowered the jury to make a life-imprisonment recommendation a part of their verdict; that it did not expressly, or by implication, require the jury to render a verdict of guilty without the recommendation where they were not all agreed upon so doing; that, until the jury reached agreement on every part of their verdict, they had not agreed upon the verdict; that in such cases the legislature required the jury to determine

"*First*, whether the accused is guilty of the crime charged; *second*, whether the sentence shall be death or whether the trial judge may pronounce a sentence of life imprisonment. Both questions must be determined *by the jury*, and the jury's answer to both questions must be embodied in its verdict. A juror considering the question of whether an accused is guilty of the crime charged can no longer be influenced consciously or unconsciously by knowledge that the finding of guilt of the crime charged will entail a mandatory penalty which in his opinion is not justified by the degree of moral guilt of the accused. Each juror should now know that the finding of guilt does not carry that mandatory penalty unless the jury fails to make a recommendation of life imprisonment a part of the verdict and each juror should know that he is one of the twelve judges who shall decide what the verdict shall be in all its parts. Until the twelve judges have agreed on every part of the verdict they have not agreed on any verdict." (*Id.* at 171.)

And so we reach the real question of this case. Should a federal jury report as their verdict that part of their deliberations which resulted in the finding of guilt of first degree murder if they cannot agree on the alleviating qualification, or should they be advised that their disagreement on the question of appropriate punishment may conscientiously be adhered to so that, if there be no likelihood of an agreement after making such an effort as is due from a conscientious jury, there would be no escape from reporting disagreement. After considerable doubt, as I have indicated, I find that the weight of considerations lies with giving the jury the wider power which the Court's construction affords.

"The decisions in the highest courts of the several States under similar statutes are not entirely harmonious,

but the general current of opinion appears to be in accord with our conclusion." *Winston* v. *United States, supra,* at p. 313. The fair significance to be drawn from State legislation and the practical construction given to it is that it places into the jury's hands the determination whether the sentence is to be death or life imprisonment,[6] and, since that is the jury's responsibility, it is for them to decide whether death should or should not be the consequence of their finding that the accused is guilty of murder in the first degree. Since the determination of the sentence is thus, in effect, a part of their verdict, there must be accord by the entire jury in reaching the full content of the verdict.

The Government contends that because of its "clear terms" little weight should be accorded the failure of Congress to repudiate the interpretation placed upon § 330 of the Criminal Code by the *Smith* case in 1931. That decision and acquiescence in it answer the claim that the section precludes a reading of it opposed to that which the Government offers. Moreover, it is significant that the proposed revision of the Criminal Code[7] leaves the form of this provision unchanged. This revision doubtless had the expert scrutiny of the Department of Justice,[8] and that Department must have had knowledge

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[6] Indeed, we said in the *Winston* case that Congress by the Act of 1897 established the "simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or by imprisonment." 172 U. S. at 312.

[7] H. R. 3190, 80th Cong., 1st Sess., § 1111 (b), as passed by the House on May 12, 1947, 93 Cong. Rec. 5049.

[8] See *id.* at 5048; Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H. R. 1600 and H. R. 2055, 80th Cong., 1st Sess., pp. 33–35. It is interesting to note that the proposed revision itself contains most of the different forms by which legislatures have retained capital punishment as a penalty for the commission of certain crimes but have not made its imposition mandatory

of the judicial gloss put upon the retained provision by the *Smith* case.[9]

The care that trial judges should exercise in making clear to juries their power and responsibility in trials for murder is emphasized by the uncertainties regarding the construction appropriate to the jury's power to affect the punishment on a finding of guilt of murder in the first degree, now resolved by this decision. It fell upon the trial judge here to instruct the jury as to this power. Was his charge in accord with the statute as construed by us? The court below held that it was; the Government concedes that it was not. The charge and the instructions given were such as to permit reasonable

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upon a finding of guilty. *E. g.*, § 2113 (e) (murder in commission of bank robbery—"not less than ten years, or punished by death if the verdict of the jury shall so direct"); § 1992 (wrecking train which results in death of any person—"death penalty or to imprisonment for life, if the jury shall in its discretion so direct"); § 1201 (a) (kidnapping—"(1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed"); § 2031 (rape—"death, or imprisonment for any term of years or for life"). There is nothing in either the committee's report or the reviser's notes on these sections to indicate whether these are differences in form or in substance. See H. Rep. No. 304, 80th Cong., 1st Sess.

[9] The various Governmental agencies are apt to see decisions adverse to them from the point of view of their limited preoccupation and too often are eager to seek review from adverse decisions which should stop with the lower courts. The Solicitor General, however, must take a comprehensive view in determining when certiorari should be sought. He is therefore under special responsibility, as occupants of the Solicitor General's office have recognized, to resist importunities for review by the agencies, when for divers reasons unrelated to the merits of a decision, review ought not to be sought. The circumstances of the *Smith* case present a special situation, and the intention to carry the implication of "acquiescence" beyond such special circumstances is emphatically disavowed.

minds to differ on this issue, and therein lies the error.[10] Charging a jury is not a matter of abracadabra. No part of the conduct of a criminal trial lays a heavier task upon the presiding judge. The charge is that part of the whole trial which probably exercises the weightiest influence upon jurors. It should guide their understanding after jurors have been subjected to confusion and deflection from the relevant by the stiff partisanship of counsel.

To avoid reversal on appeal, trial judges err, as they should, on the side of caution. But caution often seeks shelter in meaningless abstractions devoid of guiding concreteness. Clarity certainly does not require a broad hint to a juror that he can hang the jury if he cannot have his way in regard to the power given to him by Congress in determining the sentence of one guilty of first-degree murder. On the other hand, conscientious jurors are not likely to derive clear guidance if told that "on both guilt and punishment [they] must be unanimous before any verdict can be found." They should be told in simple, colloquial English that they are under duty to come to an agreement if at all possible within conscience, for a verdict must be unanimous; that a verdict involves a determination not only of guilt but also of the punishment that is to follow upon a finding of guilt; that the verdict as to both guilt and punishment is single and indivisible; that if

[10] The jury was instructed that "before you may return a qualified verdict of murder in the first degree without capital punishment that your decision to do so must be unanimous." By and of itself this instruction was consonant with either construction of the statute. If the jury had also been instructed either that "before you may return a verdict of murder in the first degree your decision not to add the qualification 'without capital punishment' must be unanimous" or that "if you are all agreed that the defendant is guilty but you are not all agreed to add 'without capital punishment' you must return a verdict of murder in the first degree without the qualification," they would have known which construction of the statute the trial judge adopted, and so would we.

they cannot reach agreement regarding the sentence that should follow a finding of guilt, they cannot render a verdict; and this means that they must be unanimous in determining whether the sentence should be death, which would follow as a matter of course if they bring in a verdict that "the accused is found guilty of the crime of murder in the first degree," and they must be equally unanimous if they do not wish a finding of guilt to be followed by a death sentence, which they must express by a finding of guilt "without capital punishment."

MR. JUSTICE BURTON concurs in this opinion.

APPENDIX.

*State legislation concerning the punishment for first degree murder.**

A. Death penalty mandatory:

(1) Conn. Gen. Stat. § 6044 (1930).
(2) Mass. Gen. Laws c. 265, § 2 (1930).
(3) N. C. Code Ann. § 4200 (1939).
(4) Vt. Pub. Laws § 8376 (1933).

B. Death penalty abolished:

(5) Me. Rev. Stat. c. 117, § 1 (1944).
(6) Mich. Stat. Ann. § 28.548 (1938).
(7) Minn. Stat. § 619.07 (1945).
(8) R. I. Gen. Laws c. 606, § 2 (1938) (penalty for murder in first degree is life imprisonment unless person is under life imprisonment sentence at time of conviction).
~~(9) S. D. Code § 13.2012 (1939).~~
(10) Wis. Stat. § 340.02 (1945).

~~*C.* Death penalty not mandatory:~~

~~I. States where no provision is made for jury recommendation, but where the court may fix the punishment at death or life imprisonment:~~

~~(11) Ind. Ann. Stat. § 10-3401 (Burns 1942) (words "or life imprisonment" added by the legislature in 1939; statute not construed, but reported cases indicate that sentencing of death or life imprisonment done by trial court and not by jury.).~~

*It is appropriate to give warning that the meaning attributed to some of the statutes by this classification does not have the benefit of guiding State adjudication. The ascertainment of the proper construction of a State statute when there is not a clear ruling by the highest court of that State is treacherous business. Nor can one be wholly confident that he has found the latest form of State legislation.

C. Death penalty not mandatory—Continued.

H. States where jury recommendation of life imprisonment is not binding on trial court:

(12) Del. Rev. Code § 5330 (1935).

(13) N. M. Stat. Ann. § 105–2226 (1929).

(14) Utah Rev. Stat. Ann. § 103–28–4 (1933).

III. States where jury's verdict must specify whether the sentence is to be death or life imprisonment:

(15) Ark. Dig. Stat. § 4042 (1937) (as interpreted by the courts).

(16) Colo. Stat. Ann. c. 48, § 32 (1935).

(17) Ill. Ann. Stat. c. 38, § 360 (1935).

(18) Iowa Code § 12911 (1939).

(19) Kan. Gen. Stat. Ann. § 21–403 (1935).

(20) Ky. Rev. Stat. Ann. §§ 435.010 and 431.130.

(21) Mo. Rev. Stat. Ann. § 4378 (1939) (as interpreted by the courts).

(22) N. D. Comp. Laws Ann. § 9477 (1913).

(23) Okla. Stat. Ann. tit. 21, § 707 (1937).

(24) Pa. Stat. Ann. tit. 18, § 4701 (1945).

(25) Tenn. Code Ann. § 10772 (Williams 1934).

(26) Tex. Pen. Code Ann. art. 1257 (1936). ("The punishment for murder shall be death or confinement in the penitenfor life

(16) Ind. Ann. Stat. §§ 10-3401 and 9-1819 (Burns 1942).

(24) S. D. Sess. Laws 1939, c. 30, amending S. D. Code § 13.2012 (1939) (but even if jury specifies death sentence, court "may nevertheless pronounce judgment of life imprisonment").

C. Death penalty not mandatory—Continued.

IV. States where sentence of death *or* life imprisonment is at the discretion of the jury:

(28) Ala. Code Ann. tit. 14, § 318 (1940).
(29) Ariz. Code Ann. § 43–2903 (1939).
(30) Cal. Pen. Code § 190 (1941).
(31) Ga. Code Ann. § 26–1005 (1936).
(32) Idaho Code Ann. § 17–1104 (1932).
(33) Mont. Rev. Code Ann. § 10957 (1935).
(34) Neb. Rev. Stat. § 28–401 (1943).
(35) Nev. Comp. Laws Ann. § 10068 (1929).

V. States where the punishment is life imprisonment unless the jury specifies the death penalty:

(36) N. H. Rev. Laws c. 455, § 4 (1942).
(37) Wash. Rev. Stat. Ann. § 2392 (1932).

VI. States that have statutes more or less like the federal provision under consideration:

(38) La. Code Crim. Law & Proc. Ann. art. 409 (1943).
(39) Md. Ann. Code Gen. Laws art. 27, § 481 (1939).
(40) N. J. Stat. Ann. § 2:138–4 (1939).
(41) N. Y. Crim. Code and Pen. Law § 1045–a.
(42) Ohio Gen. Code Ann. § 12400 (1939).
(43) Ore. Comp. Laws Ann. § 23–411 (1940).
(44) S. C. Code Ann. § 1102 (1942).
(45) W. Va. Code Ann. § 6204 (1943).
(46) Wyo. Comp. Stat. Ann. § 9–201 (1945).

C: Death penalty not mandatory—Continued.

VII. States that give effect to jury recommendation for life imprisonment even when jury is not unanimous in making that recommendation:

(47) Fla. Stat. Ann. § 919.23 (1944). ("Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment for life.")

(48) Miss. Code Ann. § 2217 (1942). ("Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment . . . in which case the court shall fix the punishment at imprisonment for life.")